

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT
) CASE NO: 2017-CP-04-1932

Hicks Unlimited, Inc.,

PLAINTIFF,

-vs-

Unifirst Corporation,
A Massachusetts Corporation,

DEFENDANT.

TRANSCRIPT OF RECORD

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APR 12 2018

SC Court of Appeals

November 27, 2017
ANDERSON, SOUTH CAROLINA

BEFORE:

THE HONORABLE R. SCOTT SPROUSE, JUDGE

APPEARANCES:

James S. Eakes, Esquire
Attorney for the Plaintiff

Jude C. Cooper and Ian D. McVey,
Attorneys for Defendant

LESA D. WILLIAMS
Court Reporter

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EXHIBITS

NO EXHIBITS ENTERED

THE COURT: All right, let's go on the record. What's our first case?

MR. MCVEY: Your Honor, Ian McVey on behalf of Defendant Unifirst Corporation. This is Hicks Unlimited, Inc., versus Unifirst Corporation, a Massachusetts corporation, case number 2000-CP-04-01932. As a housekeeping matter, I have an order to hand up to have Mr. Jude Cooper admitted *pro hac vice*. Mr. Eakes has consented to that. All the requisite -- the motion was filed. All the requisite provisions have been received by the Court. I'd just like to, if I may approach.

THE COURT: Yes, sir.

MR. MCVEY: Thank you. I've got multiple copies in here for the Court. Thank you.

THE COURT: Okay.

MR. MCVEY: I didn't know how many copies that the clerk would want, so I just ---

THE COURT: Well, it'll have to be e-filed.

MR. MCVEY: Okay.

THE COURT: It'll have to be ---. But I'm going to look at it. I'm going to look at your hard copy here, but you'll have to file it through the system.

MR. MCVEY: Okay. It can't be -- can you execute it, and have them e-file it? I don't -- I'm not sure I've completely figured out the state --- e-filing system yet. And I don't think I'm the only one.

THE COURT: I am not the appropriate technical expert to advise you on that, but I can -- just let me look at it real quick.

MR. MCVEY: Sure. Thank you, Judge.

THE COURT: All right, I have reviewed the documents submitted on behalf of Mr. Jude Cooper on a *pro hac vice* application. The paperwork appears to be in order and this is consented to by Mr. Eakes, counsel for the Defendant, so I will order from the bench that that

be approved. Mr. McVey, you can just submit the order through e-filing, but it has been approved from the bench.

MR. MCVEY: Thank you, Your Honor.

MR. COOPER: Thank you, Your Honor.

MR. MCVEY: I appreciate that. Your Honor, we're going to hand these cases to Mr. Eakes now. I also have the cases that we're going to be discussing today, and ---

THE COURT: Okay.

MR. MCVEY: --- in support of the Motion to Compel Arbitration.

MR. EAKES: Thank you.

THE COURT: All right. This is the Defendant's Motion to Compel Arbitration.

MR. EAKES: Your Honor, we had -- when we filed our action -- we were forced to file an action. We also have a Motion to Stay Arbitration.

THE COURT: Okay. All right. Let me hear from the Defendant first. It looks like their motion was listed first, so, then I'll hear from you, Mr. Eakes.

MR. COOPER: Thank you very much, Your Honor. May it please the Court? This was originally commenced as an arbitration matter back in June of this year. Unifirst filed an arbitration through the American Arbitration Association and served that on the Plaintiff in this case, Hicks Unlimited, for a breach of a -- what was called a flame-resistant garment agreement that the parties entered into back in 2006, pursuant to which my client, Unifirst Corporation rented to Hicks Unlimited a set of flame retardant garments, and the Defendant paid a rental service charge for that service over a period of approximately 11 years.

In response to the arbitration demand, the parties engaged in a preliminary hearing, at which time the final hearing was -- the date of the final hearing was set. Shortly thereafter, Hicks Unlimited filed this action seeking to stay the arbitration on several grounds, which I

will discuss in my motion. First off, my --- counsel provided a copy of several cases that we're going to rely on in support of our motion.

The first, *Parsons vs John Weiland Homes*, talks about just the general policy concerning arbitration in this state, that it's the policy of the state of South Carolina to favor arbitration disputes and this -- to that end, there's a heavy presumption in favor of arbitrability which requires that when the scope of the arbitration clause is open to question, the Court must decide in favor of arbitration. So, the questions before the Court today are as follows.

Number one, is there an agreement to arbitrate between the parties? Number two, if the answer to question number one is yes, did -- does the scope of the dispute -- or, excuse me, does the dispute fall within the scope of the arbitration clause? The answer to question number one is that there is a contract between the parties. Now, there's no dispute between Hicks Unlimited and Unifirst, but there was a contract. It was single-page, double-sided, and on the back side of the contract, there was an arbitration clause. And the scope of that arbitration clause is very broad. I'll go to the specific language in just a moment when I talk about the -- whether the dispute falls within it.

On its face, the parties performed under this contract for about 11 years. The customer received service, paid for it. Unifirst provided those garments, updated them over the course of 10 years. So, on its face, there is a contract between the parties, and that contract contains an arbitration clause. Therefore, there is an agreement to arbitrate this dispute. The challenge raised by Hicks Unlimited in this case, is that the arbitration clause is not enforceable under the terms of South Carolina code 15-48-10, which, based on an idea that there was improper notice, but the clause itself doesn't give the appropriate notice that the code provision requires.

But, that provision in the contract states that the parties agreed, amongst other things, that the dispute initiated by arbitration shall be governed by the Federal Arbitration Act, quote, unquote. So, when you have a situation where the parties agree that the Federal Arbitration Act applies, and a provision in state law that seems to go against arbitration, how does -- how do those two play out? How does that conflict work itself out?

Well, the Supreme Court of South Carolina has answered that question by saying that the provision to the Federal Arbitration Act, what the parties have agreed that the Federal Arbitration Act is going to control in an arbitration dispute, those provisions preempt application of South Carolina section 15-48-10, and that is in the *Munoz versus Green Tree Financial* case, which I have also provided a copy of to Your Honor. In that case, there was a lawsuit alleging various torts and statutory violations, and in response, the Defendant moved to compel arbitration, some of which what happened here.

And in response to that, the Plaintiff said, well, the arbitration clause, it violates section 15-48-10. In overturning the trial court's decision, the Supreme Court in California -- or excuse me, of South Carolina, said that in situations where quoted the relevant provision of the Federal Arbitration Act, which does not have a notice provision anywhere resembling the type of provision of the South Carolina state code has. And in that situation where the parties have expressly agreed that the FAA applies, the tension is resolved by saying that the state law remains applicable, if that law went to legislative or judicial arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally.

But, a state law that places arbitration clauses on an unequal footing with contracts generally is preempted where the FAA applies. And here, the parties expressly agreed to the FAA applying in this dispute. And as *Munoz* talks about, even if the parties hadn't expressly agreed in the contract that the FAA applies, it would still apply here because just by its very nature you have Hicks Unlimited doing business with Unifirst Corporation, a Massachusetts

corporation doing business in South Carolina. By itself that implicates interstate commerce, and the FAA would apply to this dispute even as the *Munoz* court talks about, even where Hicks Unlimited may not have even contemplated that the transaction they were entering into with Unifirst would implicate interstate commerce. And in that situation, the statutory challenge that they have raised is preempted by the provisions of the Federal Arbitration Act, which allow for arbitration clauses such as the one contained in the agreement between the parties to be enforceable.

Therefore, there is an agreement between the parties to arbitrate that is not preempted, or is not canceled out by South Carolina code. Once that question is answered, the remainder is whether the dispute, as alleged in the arbitration proceeding and is alleged in this action, falls within the scope of the arbitration clause. And in the contract itself, it states, quote, all disputes of whatever kind between the customer and Unifirst, based upon past, present, or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation, or performance of this agreement, shall be resolved exclusively by final and by binding arbitration.

The issue is framed by the arbitration, that the customer, Hicks Unlimited, breached the contract by terminating improperly. Hicks Unlimited -- a defense of the -- to the arbitration appears to be that they are trying to trigger the renewal clause. But the question in the applicability of the renewal clause and whether they activated the notice provision falls under the renewal clause. In other words, they are challenging the continued performance and the continued enforceability of the customer service agreement.

Consequently, the scope of the arbitration clause and the allegations giving rise to the arbitration fall directly within the provisions of the contract. So, the answer to both of those questions that the Court is being asked to consider today are yes, there is an agreement to arbitrate, and the dispute falls within the scope of the arbitration clause. Though not express

-- expressly stated in their papers. Hicks Unlimited also seems to be raising the idea that if they properly exercise the notice provision, that the contract is no longer enforceable, and therefore there's no agreement to arbitrate.

In essence, they are not raising the attack on the arbitration clause itself, but they're raising an attack on the arbitration -- the contract as a whole. And the Supreme Court case of *Buckeye Cashing -- Check Cashing versus Cardegna*, which is at 596 -- 546 U.S. 440, a copy of which is also provided to Your Honor -- the Supreme Court of the United States held that a challenge to the validity of a contract as a whole, not specifically to the arbitration clause, is a question that must be decided by the arbitrator rather than the Court.

So practical implication of that is that in this forum, the Court can decide if there's an agreement to arbitrate and decide that the dispute falls within the auspices of the arbitration clause, and that whatever other challenges there are to enforceability, such as the contract's no longer in force, the contract is unconscionable procedurally or substantively, the contract is --- by fraud, or some other defense to the enforceability of the contract, those are all questions that we can go back to the arbitrator and have him or her decide as part of the agreement of the parties to arbitrate those types of contractual disputes.

Based on the motion that we have before Your Honor, put to Your Honor, the cases we've cited in support of it, and the facts that establish an agreement to arbitrate, and that there's a dispute falling within the arbitration clause, we respectfully request the Court to grant our Motion to Compel Arbitration and send the parties back to the American Arbitration Association to conclude this dispute. Thank you very much.

THE COURT: Thank you, Mr. Cooper. All right, Mr. Eakes?

MR. EAKES: May it please the Court? May I approach?

THE COURT: Yes, sir.

MR. EAKES: I believe opposing counsel has everything I'm going to hand up other than the two cases that I'm handing up. The first one is the contract that ---. The next is a series of letters that I wrote regarding my client's objection to arbitration and kind of explains why we're here today.

THE COURT: Okay.

MR. EAKES: I would first of all like to point out that this contract was entered into between Unifirst and my client on September 21st, 2006. And we haven't done any discovery, and this is -- my argument would go a little bit beyond the allegations of the complaint. But this was a 60-month, 5-year contract to provide flame-resistant garments for my client, the flame-resistant garment agreement. You will notice the front page is what he signed.

It was signed in the parking lot of Martin and Martin Auctioneers at the ---, Highway I-85 and Highway 8. These contracts -- I've been involved with Unifirst contracts before. They have -- all of the fine print is on the second page. My client doesn't even have a copy of the original contract he signed. This was provided to us when we got involved in this litigation. But in any event, this contract was to provide flame-retardant coveralls to my client, Hicks Mechanical Unlimited. He was an independent contractor doing services for Michelin at Sandy Springs and the Star plants.

The contract was entered into in the parking lot in Anderson County, state of South Carolina. The contract was wholly to be performed within the state of South Carolina. He was to be provided flame-retardant coveralls. My client went beyond the initial 5-year rollover period, got into the second rollover without realizing that there was a rollover provision, and without realizing that there was a 90-day termination.

This contract also provides for liquidated damages. When my client learned that he was in the second rollover, he was unhappy with the services he was being provided. He was

unhappy with what he was being charged. He decided to bite the bullet and to go ahead and complete the second rollover period, which is basically 10 years. Everyone at Unifirst Greenville office for three years knew that he was only going to complete the second rollover 5-year period of this contract, and then it would be terminated.

There were emails exchanged terminating this agreement. I guess the point I'm making is that we have a threshold issue of whether there was a contract in existence at the time they attempted to force arbitration. Now, my primary -- when I -- if you read my letters on June the 9th, I wrote Unifirst to inform them that my client did not agree to arbitration. They attempted to force arbitration. This pretrial conference that was so-called telephone conference was when I was headed out the door to court and they got me on the telephone about the arbitration proceeding. I again told them that we do not agree to arbitrate. And I wrote two subsequent letters to that effect. They attempted to continue with the arbitration even in light of my letters, therefore forcing me to file this action, and also to file a Motion to Stay the arbitration proceeding. And that's what we did.

As a threshold matter, the contract clearly does not comply with the South Carolina Arbitration statute. There's nowhere where it's typed, underline, capital letters, or rubber stamped predominantly on the first page of the contract that it is subject to mandatory arbitration. Therefore, it is clear this does not comply with the South Carolina arbitration statute and under South Carolina law is not subject to arbitration. When I got the Defendant's pleadings, they are attempting to raise -- that this is subject to the Federal Arbitration Act. All the case laws, my secretary has pulled the case law -- I don't have them books up online, I'm sick today, so if I didn't get the most recent case law.

But in order to override the South Carolina statute, the contract has to implicate interstate or foreign commerce. If it does not, the South Carolina law controls it. So, they're basically arguing that federal law preempts the South Carolina statute. To do that, they have

to show that there is some implication of interstate commerce or foreign commerce, which is defined in the cases I've passed up. To determine whether a contract giving rise to the transaction between the parties involved involves interstate commerce under Federal Arbitration Act, commerce is defined as commerce among the several states or with foreign nations.

Admittedly, Unifirst is a Massachusetts corporation, but they've got places of business all over South Carolina. The case law dealing with whether you have a federal preemption basically *dicta* states to ascertain whether an arbitration agreement implicates under state commerce in the Federal Arbitration Act, a court must examine the agreement, the complaint, and the surrounding facts, focusing particularly on what the terms of the agreement specifically require for performance.

This agreement provides for Unifirst to provide flame-retardant coveralls to my client. They were transported by the same driver from Greenville to the Michelin plant every week. The dirty overalls were picked up and taken back to the Michelin plant. My client has always done business for Michelin in Anderson County. He's a South Carolina corporation. Unifirst has a registered agent. The service of process are involved in numerous -- in a lot of litigation in this state over that liquidation clause -- liquidated damages clause.

This case does not involve interstate commerce, plain and simply. Therefore, there would be no preemption. The contract clearly does not comply with South Carolina Arbitration Act, section 15-48-10. Under the section 15-48-20, we're entitled to have a stay of the arbitration. Now, I didn't -- we haven't done any discovery. I don't know what their position is on why interstate commerce is implicated in this action. I can't see that it is.

Also, this clause that they refer to is buried at the end of this contract in the fine print. I'm not sure who would read it. But it also states that my client waives his right to a jury trial and that this paragraph shall be governed by New York law -- contract entered into in South

Carolina, wholly performed in South Carolina, no implication of interstate commerce. I believe it is our position that the Plaintiff is entitled to have this matter -- the arbitration stayed. The Court can have a further hearing on -- I take it that Mr. Cooper's Motion to Compel Arbitration is in the form of a Motion for Summary Judgment.

Like I've stated, we have not done any discovery, but unless there is some factual basis for implicating interstate commerce, this matter should go back to the South Carolina Court of Common Pleas. It is our position that by compelling arbitration under the circumstances of a 10, 11-year old contract, it would be grossly unfair to my client and would impair a number of substantial substantive rights that he has to a jury trial, discovery, and other things that you have in Common Pleas court. Thank you, Your Honor.

THE COURT: All right, gentlemen let me ask you a couple of questions and I'm going to -- Mr. Eakes, you're still standing. I'm going to ask you first, and then I'm going to turn it over to Mr. Cooper. This contract was originally signed September 21st, 2006, so the first 60-month period should have ended September 21st, 2011, is that ---

MR. EAKES: That is correct, Your Honor.

THE COURT: Okay, and the second period should have ended September 21st, 2016?

MR. EAKES: Yes, Your Honor, that's correct.

THE COURT: When did your client notify the Unifirst company that he was terminating the contract?

MR. EAKES: He notified them -- he never -- he didn't have the contract. He notified them three years before -- approximately three years before September 21st, 2016. He told them he was unhappy. He told them that he was going to terminate the contract, that he was not going to renew it, but that he would fulfill the obligations of the first rollover because they had -- because he was in the second -- in the first rollover period. But

admittedly, the only emails he could come up with start in September of 2016. And there is a 90-day written notification part to that contract, and that's where you get into, you know, whether they should be a --- under all the facts and circumstances, things that have to be fleshed out and tried by either a court or a jury.

THE COURT: Okay. Mr. Cooper, do you want to respond to that?

MR. COOPER: Your Honor, the terms of the contract under miscellaneous, the last paragraph on the back page -- again, this is a one-page contract, double-sided -- says that all written notices provided to Unifirst -- the last sentence in that paragraph -- all written notices provided to Unifirst must be sent by certified mail to the attention of the location manager. Under the term of renewal section, a renewal clause would have activated again in -- effective June of 2016, unless Hicks Unlimited sent written notice of its intent not to renew the contract no less than 90 days before the expiration of the next triggering date. There's no facts that have been induced either in the petition or in the arbitration to indicate that they've complied with that provision.

Regardless, what counsel is talking about is whether there was an enforceable agreement as of 2017. He's not arguing whether there was an enforceable agreement at all. It was clearly an enforceable agreement for 10 years, but nobody seems to be arguing that.

THE COURT: All right, well, let me ask you this. He's saying his client is paid up through the second rollover. Is that correct?

MR. COOPER: I believe that is correct, because Unifirst then continued to provide services after the -- for the third five-year period.

THE COURT: So, your client's position is that since he didn't send written notice, he owes another five years' worth of contract?

MR. COOPER: He owes the damages that are required under the contract, which is -- which includes liquidated damages calculated at 50 percent of the average weekly service

amounts, multiplied by the remainder of weeks on the term of the agreement, which I believe it went several months into the third five-year period.

THE COURT: Okay. And your client -- your position is your client, based on the information you have, never received a notice in accordance with the contract of termination?

MR. COOPER: That is correct, Your Honor. And even if it had, I submit to Your Honor whether they properly terminated is a question that the arbitrator is supposed to decide.

THE COURT: Okay, okay. Mr. Eakes, I'm going to give you last word.

MR. EAKES: Well, I mean, just quite simply, Your Honor, that paragraph he refers to, I had it in another case. I had --- it's liquidated damages are not a penalty. I have some question about that, but as the Court -- as you indicated, my client bit the bullet and for three years finished out the second rollover and paid Unifirst every dime he owed them through the second rollover period. And they're trying to impose this liquidated damages clause on him because he didn't technically send written notice as required by the contract, which is a trap if you don't have a contract, number one. But number two, the whole issue is whether or not this contract is subject to mandatory arbitration, and it's our -- again, our position that it does not have the required terminology to force mandatory arbitration under South Carolina law, and there is no interstate commerce implicated.

THE COURT: I haven't had an opportunity to read this in detail yet. What is the -- Mr. Cooper, you mentioned it's -- and I see it here, the amount equal to 50 percent of the average weekly amount's invoice. All right, is there some sort of notice or summary given to the party that you allege violated the contract? How is that calculated by your ---

MR. COOPER: Each week, Unifirst provided service to Hicks Unlimited and provided, in connection with those services, tendered to the customer a weekly invoice for -- it's a weekly rental charge, essentially. Every week that they provide -- every week that they

have the garments and are using them, they get an invoice for the rental rate for those garments. And the way that the liquidated damages is calculated is that you take the invoices that Unifirst provided to them on a weekly basis, take the last 26 weeks, get the average of them, and multiply that by half, and multiply that by the number of weeks remaining in the term of the agreement.

THE COURT: Okay. All right. Well, gentlemen, I'm going to read the materials that have been submitted and this case law, and I appreciate your well thought out arguments, and I'll take this under advisement, and have my law clerk email you.

MR. EAKES: Thank you, Your Honor.

MR. COOPER: Thank you very much, Your Honor.

MR. MCVEY: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED LESA D. WILLIAMS, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF ALL REQUESTED PROCEEDINGS RECORDED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS, ANDERSON COUNTY, SOUTH CAROLINA, ON THE 27th DAY OF NOVEMBER, 2017.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

April 2, 2018



 LESA D. WILLIAMS
 COURT REPORTER

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Appellate Case No.: 2018-00468;

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SC Court of Appeals

Dear Ms. Allen,

Please find attached a copy of the November 27, 2017 Hearing Transcript in connection with the above Civil Action No. I mailed a copy to the Office of Court Administration on April 4, 2018 but did not include a copy to The South Carolina Court of Appeals. Should you have any questions or need a hard copy, please do not hesitate to contact me. Sincerely, Cindy Gatlin

Cindy Gatlin

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